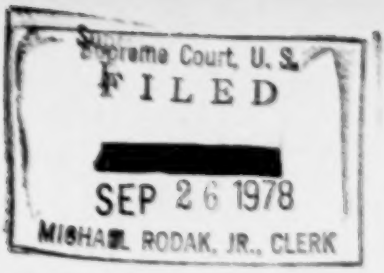

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78- **523**

WILLIE BAILEY, et al.,

Appellants,

v.

J. CLAYTON HARGROVE, etc., et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

CHRISTOPHER COATES
LAUGHLIN McDONALD
NEIL BRADLEY
52 Fairlie Street, NW
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ATTORNEYS FOR APPELLANTS

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-

WILLIE BAILEY, ROBERT HARGROVE, GEORGE W. THOMPKINS, and WALTER DANIEL, individually and on behalf of all those similarly situated,

Appellants,

versus

J. CLAYTON HARGROVE, individually and in his official capacity as Judge of the Probate Court of Putnam County; JEFF A. MADDOX, JR., BETTY HARPER, AMELIA LOGAN, ANDREW SADDLER, and FRANK J. CARNES, individually and in their official capacities as members of the Putnam County Board of Education,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from the Order of the United States District Court for the Middle District of Georgia, sitting as a

court of three judges, entered on June 28, 1978, which held that Georgia Laws 1962, p. 776 does not fall within the coverage of §5 of the Voting Rights Act of 1965.

OPINION BELOW

The opinion of the United States District Court for the Middle District of Georgia dated June 28, 1978 is unreported and is appended hereto at 1a.

JURISDICTION

This action was brought under the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and the following provisions of the United States Code: 28 U.S.C. §§1331, 1343(3) and (4), 2201, 2281, and 2284; and 42 U.S.C. §§1973c and 1983.

Plaintiffs filed this class action on December 23, 1976, to enforce §5 of the Voting Rights Act of 1965, in selecting members of the Putnam County,

Georgia, Board of Education.[1] A statutory three-judge district court was convened and it held on June 28, 1978, that Georgia Laws 1962, p. 776 did not fall within the preclearance requirements of §5. Notice of appeal was filed on July 28, 1978, and is appended hereto at 12a.

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C.. §1253 and 42 U.S.C. §1973c. Allen v. State Board of Election, 393 U.S. 544 (1969).

STATUTORY PROVISIONS INVOLVED

This appeal presents a question as to whether election changes enacted prior to November 1, 1964, but not to become

1. Plaintiffs, black registered voters of Putnam County, also sought declaratory and injunctive relief against the use of at-large elections for the members of the Board of Education, the Putnam County Board of Commissioners, and the Eatonton, Georgia, City Council, on grounds that such election schemes unconstitutionally diluted minority voting strength. These issues are for a single judge court and are presently pending. Furthermore, plaintiffs raised other claims under §5 of the Voting Rights Act of 1965 before the three-judge court, but no other §5 issue is raised in this appeal other than the one arising under Georgia Laws 1962, p. 776.

effective until November 3, 1964, are subject to the preclearance requirements of §5. The validity of the state law is not at issue. The state law, Georgia Laws 1962, p. 776, and 42 U.S.C. §1973c are appended hereto at 14a and 19a respectively.

QUESTIONS PRESENTED

I. Whether §5 of the Voting Rights Act of 1965, which governs state election procedures "different from [those] in force or effect on November 1, 1964," covers changes enacted prior to that date but which under state law were not and could not have been in force until after that date?

II. Whether the district court misapplied this Court's holding in Perkins v. Matthews, 400 U.S. 379 (1971), in ruling that a state law enacted prior to November 1, 1964 but which did not go into effect until November 3, 1964, was not governed by §5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

This case involves the coverage of §5 of the Voting Rights Act of 1965. Appellants sought, among other things, declaratory judgment that Georgia Laws 1962, p. 776 constituted changes in election standards, practices and procedures within the coverage of §5 and injunctive relief against the use of those changes until appellees obtained administrative or judicial preclearence pursuant to 42 U.S.C. §1973c.

Article VIII, Sec. 5, Para. 1, of the 1945 Constitution of the State of Georgia provided that various boards of education would be composed of five members, selected by the grand jury. Paragraph 2 of the same article and section of the 1945 Constitution provided that the manner of selecting members of a board of education could be changed by a local constitutional amendment if ratified by a majority of the registered voters of the jurisdiction in a referendum vote.

Georgia Laws 1962, p. 776 is a local constitutional amendment that changed the

manner of selecting members of the Putnam County Board of Education from appointment by the grand jury to at-large elections. Numbered post and majority vote requirements were also implemented. 15a. The local constitutional amendment was enacted by the Georgia legislature in 1962, and was ratified by the voters on November 6, 1962.

There is no question that this statute was a "change" of the type covered by §5. The only issue is whether or not it is "covered" by the Act, i.e., whether it was in force or effect on or prior to November 1, 1964. By its express terms, Georgia Laws 1962, p. 776 was not to become effective until the general election in 1964.[1]

Before the district court, appellees incorrectly contended that had an election been held on November 1, 1964, the provisions of Georgia Laws 1962, p. 776 would have been utilized. (Memorandum in Support of Proposed Orders by Defendant, Putnam County Board of Education, p. 2.)

1. In 1964 the general election in Putnam County, Georgia, was held on November 3, 1964, the same day as that year's federal election.

On June 28, 1978, the district court ruled that Georgia Laws 1962, p. 776 did not fall within the coverage of §5 because it was in force or effect prior to November 1, 1964.

On July 12, 1978, appellants filed a motion for relief from the June 28, 1978 order of the district court, pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure. The district court never ruled on that motion.

On July 28, 1978, appellants filed their notice of appeal from the June 28, 1978 order.

THE QUESTIONS ARE SUBSTANTIAL

I. REVIEW IS REQUIRED BECAUSE THE DISTRICT COURT MISAPPLIED PERKINS V. MATTHEWS, 400 U.S. 379 (1971), WHICH GOVERNS THIS CASE, AS THE DISTRICT COURT ACKNOWLEDGED.

In Perkins v. Matthews, 400 U.S. 379 (1971), this Court ruled that in determining whether a change in voting standards, practices and procedures falls within the coverage of §5's preclearance requirements:

> §5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date. Id., 400 U.S. at 394.

Here the district court properly acknowledged that the Perkins test was applicable to this case. However, the district court then reasoned that:

> The amendment providing for election of this board of education after its enactment by the legislature in 1962, and its ratification by the voters in November, 1962 was complete in every respect, and the first election was then scheduled for November, 1964, on the Tuesday following the first Monday. If that election had been held a few days earlier on November 1, it would have been held pursuant to this amendment and the same way it was actually held that November on the Tuesday following the first Monday. 7-8a.

The district court was correct that if the general election had been held on November 1, 1964, Ga. Laws 1962, p. 776 would have governed the election of members of the Putnam County Board of Education. But under Georgia law, no "general election" could have been held on November 1, 1964.

Ga. Code §§34-103(h) and (m) and 34-802 and the 1945 Constitution of the State of Georgia, §2-1602.[1] Thus, by its terms Ga. Laws 1962, p. 776 would not come into force until the 1964 "general election," and as noted supra, under Georgia law, the 1964 "general election" could not lawfully have been held until November 3, 1964.

The district court misapplied Perkins by confusing the hypothetical test used in Perkins with the realities of state law.

---

1. The 1962 constitutional amendment at issue here, Ga. Laws 1962, p. 776, provides that it shall first be applicable "at the general election in 1964." The Georgia Code provided that all county officers [including those at issue here] are to be elected at the "November election." Ga. Code §34-802. Both Ga. Code §34-103(h) and (m) and the 1945 Constitution of the State of Georgia, §2-1602, provide that the "November election" shall be held on the Tuesday next following the first Monday of November in even numbered years. Accordingly, in no year could the "general election" be held earlier than November 2, and in 1964 it could not be held until November 3. Thus, under state law, Ga. Laws 1962, p. 776 could not have been in force until November 3, 1964.

The purpose of the hypothetical test used in Perkins was to determine what law would have applied if an election had been held on November 1, not to presume, in contravention of state law, that an election would have been held on November 1, 1964. As noted under Georgia law, the 1964 general election could not lawfully have been held on November 1. The hypothetical test used in Perkins does not require the lower courts to disregard state law, and the district court erred in doing so.

Perkins made clear that the lower courts were not to disregard state law in determining what law was "in force or effect on November 1," when this Court stated that "we presume that officials will act in accordance with law." Id., 400 U.S. at 394. In accepting appellees' contentions that Ga. Laws 1962, p. 776 would have been utilized on November 1, 1964, the district court manifestly presumed that local officials

would have disregarded state law.[1] Under Perkins, it was unwarranted for the district court to do so.

II. THE DISTRICT COURT'S RULING SUBVERTS THE INTENT OF CONGRESS IN FRAMING §5 OF THE VOTING RIGHTS ACT OF 1965.

Congress enacted the Voting Rights Act on August 6, 1965. Nevertheless, the Congress chose November 1, 1964 as the trigger date for §5's preclearance requirements. It is obvious, therefore, that in doing so Congress intended to bring within the coverage of §5 all election changes that were employed for the first time

1. None of the appellees held office on November 1, 1964. Therefore their bare representations to the district court that Ga. Laws 1962, p. 776 would have been implemented in an election on November 1, 1964 cannot be regarded as evidence of what officials in office at that time would actually have done. As importantly, acceptance of appellees' argument that local officials can escape §5 coverage if they represent that they would have violated state law is an invitation to evasion of the Voting Rights Act of 1965.

in the November 3, 1964 general election. Clearly, Georgia Laws 1962, p. 776 provided for just such election changes.

This Court has stated that §5 is to be given "the broadest possible scope." Allen v. State Board of Elections, 393 U.S. 544, 567 (1969). The ruling of the district court, however, substantially restricts the reach of federal scrutiny under §5. Specifically, the holding of the district court means that election changes employed for the first time in the general election in 1964 are not within §5's coverage, so long as the enacting legislation became law by November 1, 1964. Congress used the terms "in force or effect on November 1, 1964." It applies whenever a State "shall enact or seek to administer" any standard, practice or procedure different from those in force or effect on that date. The use of the disjunctive clearly means it is not sufficient to merely enact a change for coverage to be avoided; it must be "in force or effect" as well prior to the trigger date.[1]

1. The speculation employed by the district court could be applied to any state election statute enacted prior to November 1, 1964, though effective subsequent thereto. It was manifestly
(Footnote continued on next page)

It is respectfully submitted that the reasoning by the district court clearly subverts the Congressional intent, as manifested by its choosing the November 1, 1964 trigger date, and the clear language of the Act, to reach election changes employed for the first time in the 1964 general election.

III. THE RULING OF THE DISTRICT COURT IS IN DIRECT CONFLICT WITH THE RULING OF THE THREE-JUDGE COURT IN UNITED STATES V. GEORGIA, WHICH THIS COURT HAS SUMMARILY AFFIRMED.

United States v. Georgia, Civ. No. C76-1531A (N.D.Ga. September 30, 1977), aff'd, ___U.S.___, 98 S.Ct. 2840 (1978),[1] also considered the applicability of §5 to changes in Georgia election procedures enacted prior to November 1, 1964 but which were not to go into effect until after that date. In that case the State argued before the three-judge court that changes in Georgia election laws enacted

(Footnote continued from preceding page)
erroneous to so speculate regarding a statute which by its own terms forbade its use prior to the 1964 general election.

1. This unreported opinion is appended hereto at 23a.

in June, 1964 were exempt from the preclearance requirements of §5 even though they would not go into effect until after November 1, 1964. In a holding essential to its judgment in that case, the district court rejected the contention that the date of enactment determined the applicability of §5, stating that:

> [A] change in election procedure passed prior to the act but effective after the act would constitute a change within the meaning of the act. Consequently, the State's argument that no preclearance was necessary for the complained of sections must fail.
> Id., slip opinion, p. 4. 28a.

This Court summarily affirmed. ___U.S.___, 98 S.Ct. 2840 (1978).

Thus, not only are the decisions of two three-judge courts in Georgia in conflict on the proper application of §5 in this setting, but this Court's affirmance of another three-judge court determination is in conflict with the determination of the lower court. Plenary review is merited on both grounds. See, Hicks v. Miranda, 422 U.S. 332 (1975).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIE BAILEY, ET AL., Plaintiffs, vs. ROY L. VINING, JR., individually and in their capacity as members of the Board of Commissioners for Putnam County, Georgia, et al., Defendants.	:	CIVIL ACTION NO. 76-199-MAC [Filed June 28, 1978]

Before MORGAN, Circuit Judge, BOOTLE, Senior District Judge, and OWENS, District Judge.

OWENS, District Judge:

The court having determined that no factual issues as to questions to be decided by this court of three judges are in dispute and having considered the evidence, briefs and argument of counsel does hereby dispose of all three judge issues as follows:

I. THE PUTNAM COUNTY BOARD OF EDUCATION

The 1945 Constitution of the State of Georgia was amended by an act of the legislature, 1962 Ga. Laws, p. 776, ratified by the voters of the entire state [sic; Putnam County] in November 1962, to provide for a publicly elected board of education to take the place of a board of education whose members were appointed by the grand jury. Petitioners urge that since the first election of these school board members did not take place until after November 1, 1964, this constitutional amendment was covered by the Voting Rights Act and cannot be further utilized until the Voting Rights Act is complied with. Defendants to the contrary say that the procedure of electing rather than appointing this board of education was in force and effect on November 1, 1964, and the election of November, 1966 [sic; November 3, 1964]--the first election under the Act--is not a change. Accordingly, they say this amendment is not covered by the Voting Rights Act.

Title 42 U.S.C.A. §1973c, the Voting Rights Act, provides:

"Whenever a State or political subdivision. . .shall enact or seek to administer any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . .such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty day after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."
(emphasis added).

The words "any action under this section shall be heard and determined by a court of three judges. . ." have been construed to mean that a court of three judges must determine whether or not a particular amendment, law, standard, practice, or procedure is covered by the Voting Rights Act. The further question of whether or not a covered amendment, law, standard, practice or procedure "does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color' . . ." is expressly reserved for decision by the Attorney General or the United States District Court for the District of Columbia. Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971).

The Supreme Court in Perkins v. Matthews, supra, considered whether or not a Mississippi statute enacted in 1962 to change municipal elections from ward to at-large which was ignored by the City of Canton in conducting its 1965 elections had to be submitted by the City of Canton to be used for elections in 1969 and subsequent years. Note what the court said:

> "We have concluded, nevertheless, that the change to at-large elections

required federal scrutiny under §5. That section in express terms reaches any standard, practice, or procedure 'different from that in force or effect on November 1, 1964.' In our view §5's reference to the procedure 'in force or effect on November 1, 1964,' must be taken to mean the procedure that would have been followed if the election had been held on that date. That judgment is necessarily a matter of inference in this case since Canton did not hold a municipal election on November 1, 1964. But in drawing that inference, there is little reason to blind ourselves to relevant evidence in the record by restricting our gaze to events that occurred before that date. Ordinarily we presume that officials will act in accordance with law. See First National Bank of Albuquerque v. Albright, 208 US 548, 553, 52 L Ed 614, 616, 28 S Ct 349 (1908). If the only available facts showed that Canton conducted its 1961 election by wards but that the Mississippi Legislature had subsequently enacted a statute in 1962 requiring future municipal elections to be held at large, Canton officials would be entitled to the weight of that presumption.

"With the benefit of hindsight, however, we know that Canton elected its aldermen by wards in its June 1965 municipal election. The record reflects no relevant change between

"Whenever a State or political subdivision. . .shall enact or seek to administer any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . .such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure, Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall be a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be herad and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."
(emphasis added).

> November 1964 and June 1965 to suggest that a different procedure would have been in effect if the elections had been held seven months earlier. Consequently, we conclude that the procedure in fact 'in force or effect' in Canton on November 1, 1964, was to elect alderman by wards. That sufficed to bring the 1969 change within §5. As was the case in Allen, 'it is clear, however, that the new procedure with respect to voting is different from the procedure in effect when. . .[Canton] became subject to the Act. . . .' 393 US, at 570, 22 L Ed 2d at 19. The bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide." 400 U.S. at 394, 27 L.Ed.2d at 488, 91 S.Ct. at ___.

The amendment providing for the election of this board of education after its enactment by the legislature in 1962 and its ratification by the voters in November 1962, was complete in every respect, and the first election was then scheduled for November 1964 on the Tuesday following the first Monday. If that election had been held a few days earlier on November 1, it would have been held pursuant to this amendment and the same way it was actually held that November on the Tuesday following

the first Monday. The procedures "in force or effect" in Terrell County [sic; Putnam County] on November 1, 1964, was to thus elect this board of education pursuant to this amendment. The amendment having thus been "in force or effect" on November 1, 1964, it is not covered by the Voting Rights Act.

The legislature in 1972, by 1972 Ga. Laws, p. 2678, provided for staggered terms for members of the board of education with three members to be elected in 1972 for four year terms, two members to be elected in 1974 for two year terms and their successors to be elected on November of the last year of their respective terms. This law has not been submitted to the Attorney General or the District Court for the District of Columbia pursuant to the Voting Rights Act. Since any change different from that "in force or effect" on November 1, 1964, must be submitted, Allen v. Board of Elections, 393 U.S. 544 (1969), and if not submitted may not be used, this court must enjoin further use unless and until the Voting Rights Act is complied with. An election is scheduled for November 1978. The parties are invited to immediately and not later than

fifteen (15) days submit their suggestions as to an appropriate remedy.

II. THE CITY OF EATONTON

1970 Ga. Law, p. 2945; 1972 Ga. Laws, p. 3833; 1976 Ga. Laws, p. 3305, effected corporate annexations for the city. 1977 Ga. Laws, p. 3236, changed the number of aldermen, their terms of office and method of election. These all constitute changes subject to the Voting Rights Act which have not been submitted to the Attorney General or the District Court for the District of Columbia. Further use of these laws until the Voting Rights Act is complied with must be enjoined.

III. EATONTON TAX ASSESSORS

1970 Ga. Laws, p. 2945, provided for an appointed Board of Tax Assessors. Until the passage of that law the tax assessors were publicly elected. 1908 Ga. Laws, p. 620. Abolishing the right of all citizens to elect these officials does in this court's considered judgment constitute a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. . . ."

42 U.S.C. §1973c. This considered judgment is founded upon Allen v. Board of Elections, 393 U.S. 544, 569, to wit:

> "In No. 26 an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however the purpose of §5 was to submit such changes to scrutiny."

This law has not been submitted to the Attorney General or the District Court for the District of Columbia pursuant to the Voting Rights Act.

IV. GEORGIA ELECTION CODE PROVISIONS

Petitioners contentions that §§34-1002 and 34-1514 of the Georgia Election Code are unenforceable because of failure to comply with the Voting Rights Act have been decided adversely to petitioners. United States v. Georgia, Civil No. 76-153A, U.S. District Court for the Northern District of Georgia, affirmed without opinion, ___U.S.___, 46 U.S.L.W. 3750 (June 5, 1978).

Accordingly the parties to this action, their officers, agents, servants, employees, and attorneys, and all persons receiving actual notice of this order are hereby enjoined from directly or indirectly utilizing each of the statutes herein found to be covered by the Voting Rights Act and to have not been cleared pursuant to the Voting Rights Act, all until such time as the Voting Rights Act has been complied with.

Upon hearing from the parties the court will consider what further remedial action must be ordered as to 1972 Ga. Laws 2678 providing for staggered terms for the board of education.

SO ORDERED, this the 28th day of June, 1978.

s/Lewis R. Morgan
United States Circuit Judge

s/W.A. Bootle
United States District Judge

s/Wilbur D. Owens, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIE BAILEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil
v.	)	Action No.
	)	76-199-MAC
ROY L. VINING, JR., etc., et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs appeal to the Supreme Court of the United States from the portion of the order entered by the district court in this action on June 28, 1978, which held that the local constitutional amendment to the 1945 Georgia Constitution found at Ga.Law 1962, p. 776, is not a change in election standards, practices or procedures covered by the pre-clearance requirements of 42 U.S.C. §1973c.

This appeal is taken pursuant to 42 U.S.C. §1973c.

Respectfully submitted,

s/Christopher Coates

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PUTNAM COUNTY--BOARD OF EDUCATION

Proposed Amendment to the Constitution

No. 92 (House Resolution No. 260-701).

A Resolution.

Proposing an amendment to the Constitution so as to provide for the election of the members of the Board of Education of Putnam County by the people; to provide for the election of the Chairman of the Board of Education; to provide for the filling of vacancies on the Board; to provide for the submission of this amendment for rejection or ratification; and for other purposes.

Be it resolved by the General Assembly of Georgia:

Section 1. Article VIII, Section V, Paragraph I of the Constitution, relating to county boards of education, as amended, is hereby amended by adding at the end thereof the following:

"The Board of Education of Putnam County shall be composed of five (5) members. The Chairman and the four (4) other members of the Board shall be elected by the voters of the entire county. The five (5) memberships on the Board shall be

designated as post numbers 1 through 5 respectively. The individual elected to Post number 1 shall be the Chairman of the Board. Those candidates offering for election to the Board of Education of Putnam County shall specifically designate their intention of running for a particular post by number. To be elected to such post, the candidate must receive the highest number of votes cast and at the same time the candidate must receive a majority of the total votes cast toward filling such vacancy. Any vacancy occurring in the membership of the Board of Education of Putnam County, for any cause whatsoever, shall be filled by the majority vote of the remaining members of Board of Education.

"In the event this amendment is ratified, the members of the first Board of Education of Putnam County created under this amendment shall be elected at the general election held in 1964. The members elected at such election shall take office January 1, 1965, and shall serve for a term of four years and until their successors are elected and qualified. Future elections shall be held

every four years at the same time as elections for members of the General Assembly are held and the members elected shall take office on the first day of January immediately following the election. All future members shall likewise serve for a term of four years and until their successors are elected and qualified.

"The Board of Education in Putnam County in existence at the time of ratification of this amendment is hereby abolished December 31, 1964, and the terms of all members of such Board shall expire at that time.

"The Board of Education of Putnam County as provided for herein shall be subject to all constitutional and statutory provisions relative to county boards of education, unless such provisions are in conflict with the provisions of this amendment."

Section 2. When the above proposed amendment to the Constitution shall have been agreed to by two-thirds of the members elected to each of the two branches of the General Assembly, and the same has been entered on their journals with

the "Ayes" and "Nays" taken thereon, such proposed amendment shall be published and submitted as provided in Article XIII, Section I, Paragraph I of the Constitution of Georgia of 1945, as amended.

The ballot submitting the above proposed amendment shall have written or printed thereon the following:

"For ratification of amendment to the Constitution so as to provide for the election of members of the Board of Education of Putnam County by the people.

"Against ratification of amendment to the Constitution so as to provide for the election of members of the Board of Education of Putnam County by the people."

All persons desiring to vote in favor of adopting the proposed amendment shall vote for the ratification of the amendment, and all persons desiring to vote against the adoption of the proposed amendment shall vote against ratification.

If such amendment shall be ratified as provided in said Paragraph of the Constitution, it shall become a part of the Constitution of this State. The returns of the election shall be made in

like manner as returns for elections for members of the General Assembly, and it shall be the duty of the Secretary of State to ascertain the result and certify the result to the Governor, who shall issue his proclamation thereon.

42 U.S.C. §1973c

§1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with

respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard,

practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve

the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA:		
	:	CIVIL NO.
vs.	:	C76-1531A
	:	
THE STATE OF GEORGIA, et al.	:	[Filed September 30, 1977]

Before HILL, Circuit Judge; MOYE and O'KELLEY, District Judges

ORDER

PER CURIAM

This civil action is before the court on defendants' motion to dismiss or, in the alternative, for summary judgment and on plaintiff's motion for summary judgment. The United States Justice Department on September 17, 1976, filed an action in this court seeking an order requiring the State to submit two provisions of the Georgia Election Code of 1964 to the Attorney General of the United States for clearance pursuant to the Voting Rights Act of 1965, 42 U.S.C. §1971 et seq. The case was submitted to a three-judge panel, which determined that ruling should be postponed until after the general election and that a ruling should

be made based on cross motions for summary judgment. The case was set down for oral argument on April 28, 1977, and heard by the court at that time.

In the spring of 1964, the Georgia General Assembly in an extraordinary session completely revised the Georgia Election Code. The resulting bill, Act. No. 26, Ga. Laws 1964, p. 26 (Ga. Code Ann. 34-101 et seq.), was signed by the governor on June 24, 1964. The new election code provided at §34-1002 that candidates seeking one of two or more public offices, each having the same title and to be filled at the same election by vote of the same electors, would have to designate which specific office and post they were seeking within a given district. At §34-1514 the new code provided that a majority vote was required to nominate or elect in all elections within the purview of the election code. These two provisions contained a sentence which excluded candidates for election to the governing authority of a county from the requirement of designating a post and district and from the requirement of majority vote for the year 1964.

The Voting Rights Act of 1965, 42 U.S.C. §1971 et seq. [sic] became effective in August, 1965. The Act provided that in certain states and political subdivisions any change in the voting standard, function, or procedure after November, 1964, must be cleared by approval of the District Court for the District of Columbia or the Attorney General of the United States prior to its being put into effect. Georgia is a state covered by the Act. In the case sub judice, the Justice Department contends that the provisions in question, former Ga. Code Ann. §34-1002 and former Ga. Code Ann. §34-1514, were subject to the preclearance provisions of the Voting Rights Act of 1965 in that they constituted a change in voting procedure within the meaning of the Act. This reasoning is based on the argument that since these provisions of the Georgia Election Code did not go into effect until after November, 1964, they are subject to the Act even though the Georgia Election Code of which they are a part was enacted prior to the Voting Rights Act. The United States requests that the court declare that implementation of the changes to majority vote and designated posts in primaries

and elections for county governing bodies violates section 5 of the Voting Rights Act of 1965 and that the court enjoin defendants from emplementing [sic] the changes until the requirements of section 5 have been satisfied.

The State's motion to dismiss or, in the alternative, for summary judgment is based on three main arguments: (1) that the voting practices complained of were in force prior to November 1, 1964, and, consequently, not required to be submitted to the District Court for the District of Columbia or the Attorney General of the United States for approval prior to implementation; (2) that the provisions complained of have been repealed; and (3) that the provisions complained of were, in fact, properly submitted and approved by the Attorney General.

The argument that the provisions at issue did not constitute changes within the meaning of the Voting Rights Act in that they were part of an election code enacted prior to the passage of the Voting Rights Act has been dealt with by the Supreme Court of the United States in Perkins v. Matthews, 400 U.S. 379 (1971), in a slightly different factual setting. In Perkins the appellants, voters

and candidates for city office, sought to enjoin the 1969 city election in Canton, Mississippi, on the grounds that changes in election procedure and certain boundary changes since November, 1964, had not been precleared. Among the changes complained of was a change from election by ward to at-large election of aldermen. As the Court noted, the question of a change in this instance arose in a "peculiar context." The change had been enacted by a Mississippi statute of 1962 but had been ignored by the city in the election of 1965. The Court found that a belated implementation of the at-large election of aldermen requirement in the 1969 election would constitute a change within the meaning of the Voting Rights Act of 1965:

> We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under §5. That section in express terms reaches any standard, practice or procedure "different from that in force or effect on November 1, 1964." In our view, §5's reference to the procedure "in force or effect on November 1, 1964," must be taken to mean the procedure that would have been followed if the election had been held on that date.

Id. at 394. It seems clear that if the

Court found implementation of an election provision in effect prior to November 1, 1964, to constitute a change requiring preclearance under the Voting Rights Act, a change in election procedure passed prior to the Act but effective after the Act would constitute a change within the meaning of the Act. Consequently, the State's argument that no preclearance was necessary for the complained of sections must fail.

The State's second argument is that the provisions complained of have been repealed and are no longer in effect. The State contends that §34-1002 of the 1964 election code was stricken in 1970 by Ga. Laws 1970, pp. 347, 354, and §34-1514 was stricken by Ga. Laws 1969, pp. 292, 293. While an examination of the pages cited in the laws of 1969 and 1970 reveals that the sections complained of have indeed been amended and, in fact, have section numbers different from the numbers assigned these provisions in the 1964 election code, the fact remains that in substance there has been no change in the requirement that candidates seeking party nomination for or election to the governing authority of a county shall be elected

by majority vote and shall, in case of a candidate seeking one of two or more public offices each having the same title and to be filled at the same election by the vote of the same electors, designate the specific office sought. See Ga. Laws 1964 at 174-75; Ga. Laws 1969 at 306-07; Ga. Laws 1970 at 380-81; Ga. Laws 1971 at 603-04 to trace the development of §34-1514. See Ga. Laws 1964 at 80; Ga. Laws 1970 at 369 to trace the development of §34-1002. Inasmuch as the changes complained of--the post-November 1, 1964, application of majority vote and designated office to candidates for nomination or election to the governing authority of a county--are still in effect, the State's argument that the sections complained of have been repealed must fail.

The State's final argument on behalf of its motion for summary judgment is that there has been no violation of section 5 of the Voting Rights Act of 1965 inasmuch as the complained of sections have, in fact, been precleared by the Attorney General of the United States. The reasoning behind this argument is that since after implementation of the change in

voting procedure complained of the Attorney General had occasion to consider the election code of Georgia in 1968, 1969, 1970, and 1971, he could have discovered that the complained of provisions had taken effect with regard to candidates for governing office of a county after November 1, 1964. Since the Attorney General could have discovered the change and objected to it, the State concludes that the fact that he did not object signifies that the change was approved. Central to the question of whether the provisions complained of have, in fact, been precleared is a determination of what constitutes a "submission" of a change within the meaning of the Voting Rights Act of 1965. Prior to September, 1971, there were no regulations specifying the proper manner in which a submission should be made. However, in Allen v. State Board of Elections, 393 U.S. 544 (1969), the Supreme Court discussed the meaning of a "submission" as follows:

> While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the

> Attorney General constituted a "submission." A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation directly to the Attorney General with a request for his consideration pursuant to the Act.

Id. at 571.

The entire election code of Georgia has been before the Attorney General on four occasions since 1965: in 1968, 1969, 1970, and 1971. The State argues that the Attorney General's access to the entire election code, which contained the changes complained of, but without their being specifically pointed out, constituted an effective submission of these provisions. The State relies upon the 1970 submission as particularly compelling. In 1970 the State requested review of the entire election code, which had been revised to place political primaries under the supervision of elected county and state officials. The language of this 1970 submission is interesting: "The Bill revises the Election Code in all respects to reflect this intention, together with certain other minor housekeeping changes which are self-explanatory." This clearly indicates

that the election code should be reviewed in its entirety.

In the absence of any requirement that a specific submission procedure be followed, this court finds that the submission of the entire election code of Georgia to the Attorney General with the request that he consider any changes constituted a submission of the matter to the Attorney General in an unambiguous and recordable manner as required by Allen. That the Attorney General was, in fact, aware of and had no objections to the two provisions complained of is strongly indicated by a letter which was not brought to the court's attention prior to the oral hearing. In this letter of March 30, 1973, designated as exhibit G of stipulations of fact, Stanley Pottinger, Assistant Attorney General, Civil Rights Division, assured the Ordinary of Harris County that the designated post requirement specified in §34-1015 of the Georgia Election Code, which was identical to former §34-1002 of the 1964 Election Code, had been submitted to the Attorney General in 1970 and that no objection had been interposed. That the majority vote provision had also been precleared is indicated by the decision

of the United States Court of Appeals for the Fifth Circuit in Pitts v. Cates, 536 F.2d 56 (5th Cir. 1976), in which it is clear that the court considered that provision as precleared by the Justice Department in 1970. Thus, there is evidence of general acceptance of the fact that both of the provisions complained of were in fact precleared in 1970.

Although arguments of waiver and estoppel have been abandoned by the State, the court is constrained to note that the Attorney General's delay of eleven years in bringing an action for declaratory and injunctive relief to force the State to submit the complained of provisions to a preclearance procedure is inexcusable and, if allowed, would have placed the electoral system of the state of Georgia in un uproar on the eve of a general election. For the Justice Department to attack provisions of the Georgia Election Code which have been in effect for eleven years on the sole basis that said provisions have not been precleared and with no allegations that these provisions are in any manner violative of the letter or the spirit of the fifteenth amendment to the

United States Constitution borders on the absurd.

Judgment shall be entered for the defendants.

IT IS SO ORDERED this 30th day of September, 1977.

s/JAMES C. HILL
United States Circuit Judge

s/CHARLES A. MOYE, JR.
United States District Judge

s/WILLIAM C. O'KELLEY
United States District Judge